Supreme Court, U.S.
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No._____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

UNITED STATES OF AMERICA,

Respondent,

- against -

WILFREDO TAVAREZ,

Petitioner.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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33 pp

QUESTIONS PRESENTED

1.

Whether Petitioner's due process right to a fair trial and his right to prepare a defense as guaranteed by the Fifth and Sixth Amendments of the United States Constitution, were violated by prosecutional misconduct in the form of grossly negligent pre-trial representations regarding the evidence the Government had in its possession against Petitioner?

2.

Whether the trial court's undue curtailment of Petitioner's cross-examination of a key government witness violated Petitioner's right of confrontation as guaranteed by the Sixth Amendment of the United States Constitution?

3.

Whether the trial court's failure to charge pursuant to Petitioner's requests, violated his due process right to a fair trial and his right not to testify as guaranteed by the Fifth and Sixth Amendments of the United States Constitution?

PARTIES

The names of all parties to the proceeding in the Court whose Judgment is sought to be reviewed here appear in the caption of the case.

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In The

Supreme Court of the United States

October Term, 1993

UNITED STATES OF AMERICA,

Respondent,

- against -

WILFREDO TAVAREZ,

Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

OPINIONS BELOW

The Opinion and Judgment of the United States Court of Appeals For the Second Circuit appears in Appendix A hereto at A1 to A3. The Opinion and Order of the United States District Court For The Eastern District of New York appears in Appendix B hereto at A4 to A9.

JURISDICTION

The Judgment of the Court of Appeals was entered on December 23, 1993. In accordance with Rule 13.1 of this Court, this Petition is filed within 90 days of the date of filing of the Judgment of the Court of Appeals. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1), because the criminal judgment sought to be reviewed emanates from the United States Court of Appeals For The Second Circuit.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

A. Constitutional Provisions

The Fifth Amendment of the United States Constitution provides in pertinent part:

No person...shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law.

The Sixth Amendment of the United States Constitution provides in pertinent part:

In all criminal prosecutions, the accused shall enjoy the right...to be confronted with the witnesses against him...and to have the Assistance of Counsel for his defense.

B. Federal Rules of Criminal Procedure

Rule 33 of the Federal Rules of Criminal Procedure provides in pertinent part:

"The Court on motion of a defendant may grant a new trial to that defendant if requested in the interest of justice."

STATEMENT OF THE CASE

Several important issues are raised by this case. The first is whether the Government can introduce material incriminating evidence in rebuttal, when it previously represented to Petitioner that such evidence did not exist. In this regard, Petitioner was tried pursuant to a two count indictment charging him and one Tomas Valerio ("Valerio") with conspiracy to distribute and possession with intent to distribute heroin and a substantive count of possession with intent to distribute heroin. The Government's case rested primarily on the testimony of Valerio, who had pled guilty and entered into a cooperation agreement with the Government.

During the course of these transactions, Valerio dealt with a confidential informant, Rafael Espinal. Through Rafael, the

Government was able to tape various conversations he had with Valerio and others. On one occasion, August 26, 1992, Rafael went to Valerio's apartment to obtain heroin for his "customer". Present among others, were Valerio and Dominigo Diaz ("Diaz"), an unindicted co-conspirator. While waiting for the supplier, the group engaged in conversation, which Rafael taped. The Government maintained that Petitioner was the supplier they were waiting for. When the supplier failed to appear, Rafael and his customer left.

Several weeks later, on September 17, 1992, Petitioner drove to a street location in Brooklyn, New York, where according to Valerio, he gave Valerio a bag containing heroin. Valerio gave the bag to Rafael, who was supposed to deliver it to his customer. When the customer did not appear, Valerio became suspicious and took the package back from Rafael. Minutes later, Valerio was arrested with the package by DEA Agents. A few moments later, Petitioner was arrested as he drove by the place of arrest.

Pursuant to Petitioner's letter discovery request, the prosecutor supplied Petitioner's counsel with copies of all tapes Rafael had made during the course of this case. In connection therewith, the prosecutor repeatedly informed defense counsel that Petitioner was never mentioned on the tapes and that only Valerio could identify Petitioner as the supplier of the heroin.

Defense counsel attempted to make a transcript of the August 26, 1992 tape involving Valerio, Diaz and Rafael. Because of poor audibility, large segments of the conversation could not be transcribed. The prosecutor had also made a transcript of this tape, but refused defense counsel's request for a copy. The refusal was based on the prosecutor's in court representation that she was not going to introduce the tape, because it contained nothing incriminating.

In truth and in fact, the Government's transcript contained several incriminating references to a "Wilfredo", Petitioner's first name, which permitted the inference that this "Wilfredo" was the drug supplier. The prosecutor later admitted that she overlooked these references. The transcript that defense counsel had did not contain

these references. Therefore, in detrimental reliance on the Government's representations that the tapes made no reference to Petitioner and that the confidential informant could not identify Petitioner as the drug supplier, Petitioner called Diaz, a co-conspirator, as a defense witness.

During the course of his testimony, Diaz admitted that he participated in the drug conspiracy. He also testified that before the August 26th meeting, Valerio informed him that the drug suppliers were black. Petitioner was hispanic. Finally, Diaz testified that to his knowledge Petitioner was not involved in this drug transaction. Diaz was arrested after he testified.

When Court reconvened several days later, the prosecutor announced that she was going to call the confidential informant, Rafael, in rebuttal and through him introduce the tape and transcript of the August 26th group conversation. The reason was because after Diaz testified, the prosecutor revisited her transcript of this conversation and now discovered the incriminating references to "Wilfredo". Since Rafael was a party to the conversation, she had Rafael work with a translator to create a more complete transcript of the tape.

Petitioner's counsel vehemently objected because she presented the defense, meaning she called Diaz, on the basis of the prosecutor's representation that no mention of Petitioner was made on any of the tapes. Therefore, to allow the Government to introduce the tape would constitute unfair surprise and a trial by ambush. The Government's response was simply that Diaz' testimony had opened the door and therefore what the Government was offering was permissible, rebuttal evidence. The Court agreed and overruled the objection.

During Rafael's testimony, he guided the jury through the new transcript, first to a statement Valerio's mother made to Valerio:

"Manuela: Wilfredo. With things like that in the apartment, he doesn't do it."

According to Rafael, Manuela was informing Valerio that Wilfredo would not conduct a drug business in his apartment.

The second reference in the transcript to Wilfredo occurred during a conversation between Manuela and Rafael, wherein Rafael responded that unlike Wilfredo he would prefer to do drug transactions on the street and not in an apartment. The third reference to Wilfredo in the transcript was from Diaz who asked someone, "Are you going downstairs to wait for Wilfredo downstairs." According to Rafael, that meant that Wilfredo was supposedly the one bringing the drugs.

The introduction of this evidence was devastating. From it the jury could conclude that through Diaz, Petitioner offered false exculpatory testimony concerning Petitioner's lack of involvement. Indeed, during her summation, the prosecutor repeatedly referred to the tape as corroborative of Valerio's testimony and to discredit Diaz' testimony.

That the jury specifically focused on this evidence is clear from the record. During jury deliberations, their only request was for Espinal's testimony. Shortly after they were provided with that testimony, the jury returned a guilty verdict on both indictment counts. Petitioner was ultimately sentenced to a prison term of 63 months.

After his conviction, Petitioner submitted a motion for a new trial pursuant to FRCrP 33. The basis for the motion was deceptive and unfair conduct on the part of the Government, which deprived Petitioner of a fair trial. The misconduct complained of concerned the Government's pretrial representation that the tapes contained no references to Petitioner; Petitioner's counsel's reliance and calling Diaz on the basis of this representation; the Government's revelation after Diaz testified, that the August 26, 1992 tape contained numerous references to a "Wilfredo", that is, Petitioner; the introduction of the tape which contained a statement by Diaz which was inconsistent with his trial testimony; Rafael's explanation of certain conversations which inculpated Petitioner and the Government's summation inviting the jury to consider portions of

the tape as part of the evidence establishing Petitioner's commission of the crimes in question.

The District Court (Feikens, J.) denied the motion on the basis that Petitioner's calling of Diaz invited this rebuttal testimony and that in any event, the challenged evidence constituted newly discovered evidence. See Appendix B pp. A4 to A9. Petitioner maintains that the surprise introduction of incriminating evidence previously represented as not existing, violated his due process right to a fair trial and sixth amendment right to prepare a defense. Further, this evidence was not "newly discovered". Accordingly, Certiorari should be granted on this issue.

The second important issue concerns the Court's improper curtailment of Petitioner's constitutional right of confrontation. In this regard, Petitioner's cross-examination of Espinal, the confidential informant, was severely curtailed by the Court's refusal to allow Petitioner to ask proper questions of Espinal regarding the transcript of the August 26, 1992 conversation. Not permitting Petitioner the right to controvert, neutralize, or cast doubt regarding Espinal's explanations, through proper cross-examination, cannot be considered harmless error and Petitioner is entitled to a new trial as a result of this deprivation of a fundamental constitutional right.

The third important issue concerns the Court's charge. Much of the Government's case rested on Valerio's testimony. Indeed, Valerio was the only witness who could inculpate Petitioner with regard to the substantive possessory crime. In this regard, Petitioner's counsel made a prodigious effort through cross-examination to impeach Valerio's credibility.

One avenue of impeachment was that Valerio had a recent state court conviction for dealing in heroin and cocaine. Accordingly, defense counsel submitted a request to charge concerning impeachment of a witness' credibility by reason of a prior felony conviction. The Court refused to give this specific instruction, claiming that his accomplice instructions would adequately cover this subject.

A review of the Court's instructions concerning accomplice testimony reveals absolutely no reference to Valerio's prior conviction. The failure to so charge was clearly error, because this omission violated Petitioner's right to due process.

The error was compounded by the Court's failure to also specifically charge Petitioner's 12th request to charge, concerning Petitioner's decision not to testify. This request contained the following language: "You may not draw any inference whatsoever from a defendant's decision not to testify." Though the Court gave an instruction concerning Petitioner not testifying, the Court failed to inform the jury that they could not draw any adverse inference from Petitioner's failure to testify. Although Petitioner did not alert the Court to this omission, the no adverse inference admonition is so basic and fundamental, that this omission was inexcusable and violative of Petitioner's constitutional right not to testify.

REASONS FOR GRANTING THE WRIT

I. THE PROSECUTOR'S GROSSLY NEGLIGENT FAILURE TO DISCLOSE EVIDENCE MATERIAL TO GUILT DEPRIVED PETITIONER OF HIS DUE PROCESS RIGHT TO A FAIR TRIAL AND HIS SIXTH AMENDMENT RIGHT TO PREPARE A DEFENSE

This case invites the Court to revisit the question of prosecutional misconduct and the rule announced in *Smith v. Phillips*, 455 U.S. 209 (1982), *viz.*, that such misconduct must be viewed within the context of the fairness of the trial. If the misconduct renders the trial unfair, then the defendant is entitled to a new trial.

The species of misconduct which this Court has had occasion to review comes under the general category of suppression or nondisclosure of evidence relating to guilt, innocence or punishment. See *Phillips*, supra; *Brady v. Maryland*, 373 U.S. 83

(1963); *United States v. Agurs*, 427 U.S. 97 (1976); *Giglio v. United States*, 405 U.S. 150 (1972); *Napue v. Illinois*,. 360 U.S. 264 (1959). While this case presents the nondisclosure-fair trial issue, it also presents another substantial issue not previously addressed by this Court. That issue is, when the accused's right to prepare a defense to meet the prosecutor's case is violated by prosecutorial misconduct, does the constitution compel the granting of a new trial?

In this regard, the Court in *United States v. Noe*, 821 F.2d 604 (11th Cir. 1987) at 607-08, fn. 4, characterized this right as a substantial one. Relevant also, the Sixth Amendment provides that, "In all criminal prosecutions, the accused shall enjoy the right...to have the Assistance of counsel for his defense." This language seems to imply that the right of the accused to mount a defense is of constitutional origin and that the right to counsel therefore, a necessary adjunct to that right.

That the right to prepare and assert a defense is of constitutional dimension was recognized by the Court in *Mason v. Arizona*, 504 F.2d 1345 (9th Cir. 1974). There the Court held that indigent defendants had a constitutional right to have the state pay for investigative services in order to insure counsel's effective preparation of their defense.

Therefore, this case presents the substantial issue of whether the Sixth Amendment guarantees the accused the right to prepare a defense and whether a new trial is required when prosecutional misconduct violates that right. Although this issue and the due process - fair trial issue, were raised both in the Court of original instance and the Court of Appeals, neither Court reached these issues, having found that no prosecutional misconduct occurred in this case.

These issues were raised in the trial court, initially when the tainted evidence was sought to be introduced and thereafter in Petitioner's motion for a new trial. In erroneously concluding that no prosecutional misconduct took place, the lower courts essentially refused to relieve Petitioner of the consequences of the Government's successful impeachment of a key defense witness

through its rebuttal case. What the lower courts failed to recognize or acknowledge, is that Petitioner had been duped into calling this witness by reason of the Government's pre-trial disclosure concerning the evidence it had and did not have.

Specifically, the Government represented that it did not have an informant who could identify Petitioner as the drug supplier and that it did not have in its possession, tape recorded conversations that could incriminate or implicate Petitioner. By reason of the foregoing, the prosecutor assured both Petitioner and the trial Court that she was not going to call the confidential informant to testify and that she was not going to introduce any of the tapes.

In reliance on those representations, Petitioner's counsel prepared a defense that included calling Diaz, an unindicted co-conspirator, as a defense witness. Diaz sought to exonerate Petitioner by testifying that on August 26, 1992 Valerio, the cooperating co-defendant who testified against Petitioner, informed him that the drug suppliers were black people. Diaz also testified that to his knowledge, Petitioner was not involved in this transaction.

Based upon the Government's pre-trial representations that Valerio's testimony was the only material evidence the Government had linking Petitioner to the drug conspiracy and the drugs, Diaz was obviously called to challenge that testimony, thus reducing the trial to his word against Valerio's. There is no question that this strategy was dictated and shaped by the Government's pre-trial representations, and the positions it had previously taken with regard to discovery and the evidence.

However, this defense was totally undermined and destroyed when the Government produced, after Diaz' testimony and arrest, the confidential informant, Espinal, to testify in rebuttal concerning the tape of the August 26, 1992 meeting. This is when Valerio, Diaz and Espinal were waiting in Valerio's apartment for the drug supplier to arrive. As set forth in our Statement of the Case, supra, Espinal, with the aid of a transcript, was able to testify that the people present, including Diaz, were discussing the drug dealing activities of a "Wilfredo", who Valerio was supposed to meet downstairs. That

latter statement was attributed to Diaz. In this regard during the Government's direct case, Valerio claimed that Petitioner was supposed to bring the drugs and that Valerio was going to meet him downstairs, on the street.

Thus, on rebuttal, the Government was able to introduce a remark by Diaz which was consistent with Valerio's direct testimony and inconsistent with Diaz' trial testimony, concerning the identity of the drug supplier. This inconsistency destroyed Diaz' credibility and established that Petitioner called a witness who gave false exculpatory testimony. As our Statement of the Case reflects, the Government's impeachment of Diaz led to Petitioner's conviction.

The lower court's reaction to this outrageous development was simply that Petitioner opened the door by calling Diaz and therefore cannot be heard to complain concerning the admission of this rebuttal evidence, which was in any event newly discovered. But Diaz was called because the Government represented that with the exception of Valerio, it had no other evidence to rebut Diaz' exculpatory testimony that Petitioner was not the drug supplier.

The lower court's response was that the Government did not misrepresent. However, the Government candidly admitted it did make the representations in question and further it admitted that it had in its possession at the time of the representations, a transcript of the August 26, 1992 conversation which contained the references to "Wilfredo", that Espinal testified to in rebuttal. The prosecutor on the motion for the new trial, admitted to initially overlooking these references.

Had the prosecutor informed Petitioner's counsel of these glaring references to "Wilfredo", which she did not deny that she would have done had she been aware of them, it is clear that Diaz would not have testified and there would have been no rebuttal. Patently, in *United States v. Sanders*, 893 F.2d 133 (7th Cir. 1990), the Court held that the Government is expected to honor positions previously taken with regard to discovery and that a change in position might result in harmful error. Here, the Government's negligent pre-trial disclosures and subsequent improper change of position, caused

Petitioner substantial prejudice resulting in harmful error. See also *Noe*, supra; *United States v. Peck*, 856 F.2d 825 (7th Circ. 1988); *United States v. Brodie*, 871 F.2d 125 (D.C. Cir. 1989) *cf. United States v. Masters*, 840 F.2d 587 (8th Circ. 1988). That is so because there is no question that this evidence had a substantial and injurious effect or influence in determining the jury's verdict.

We maintain that the error was of constitutional dimension because this Court must and should find that the right to prepare a defense is guaranteed by the Sixth Amendment. Under the circumstances, the failure to exclude this evidence was a clear abuse of discretion. *United States v. Coiro*, 922 F.2d 1008 (2d Cir. 1991). Another prejudicial effect of this testimony was to improperly bolster Valerio. *Cf. United States v. Cruz*, 981 F.2d 659 (2d Cir. 1992). The error was not harmless because this improper bolstering and the undermining of his defense deprived Petitioner of his right to a fair trial. *United States v. Minicone*, 960 F.2d 1099 (2d Cir. 1992).

As indicated supra, this Court in *Smith* stated that a prosecutor cannot engage in conduct which would violate a defendant's due process right to a fair trial. As discussed, the Government had a tape that inculpated Petitioner and the informant knew that the first name of the supplier was "Wilfredo". Therefore, by stating that the Government did not have this evidence in its possession, when in fact it did , this is the same as non-disclosure. That is so because of the special duty imposed upon the prosecutor, not to mislead. *United States v. Universita*, 298 F.2d 365 (2d Cir. 1960).

In *Phillips* this Court observed that the question of whether the non-disclosure violates the due process right to a fair trial, turns on whether the non-disclosed evidence was material. The standard utilized by the Second Circuit Court of Appeals is one of substantial prejudice due to non-disclosure. See *United States v. Stevens*, 985 F.2d 1175 (2d Cir. 1993). We believe that the "materiality" standard is broader than the "substantial prejudice" standard. However, under either standard, the fairness of the trial was irrevocably

compromised by the admission of the Government's tainted rebuttal evidence.

Patently, this evidence, as rebuttal evidence, was far more damaging then if had been introduced as direct evidence. Because this evidence followed, rather than preceded Diaz' testimony, it showed that Diaz' protestations of Petitioner's innocence - Valerio's suppliers were black people - were false. For, the tape contained a statement from Diaz' own lips, about waiting for Wilfredo downstairs, which when viewed in the context of Valerio's and Espinal's testimony, could be viewed as a reference to Petitioner as the supplier the people were waiting for on August 26th.

Thus, as rebuttal evidence, it conveyed to the jury that Petitioner called Diaz to try to deceive them. Further, this evidence was not newly discovered, because the Government always had it in its possession. However, if this evidence was introduced as part of the Government's direct case, the element of deception would not have presented itself. This Court requires no elucidation once a jury determines that a defendant has attempted to deceive them.

This is not speculation. The record shows that the jury during their deliberations requested and received Espinal's entire rebuttal testimony. About an hour later, the jury returned a guilty verdict.

That Petitioner may have called a less than truthful witness is immaterial. That is so because the notion that Diaz lied, was predicated entirely on evidence that the Government previously represented did not exist. A criminal trial is not a card game where the prosecutor can play its trump card after it represented that such card did not exist. Therefore, to the extent that the tainted rebuttal evidence impeached a key defense by reason that it was probative of guilt, such evidence must be deemed material. The improper introduction of this tainted evidence reduced the trial to one by ambush and thereby violated Petitioner's due process right to a fair trial.

In sum, this Court should grant Certiorari and take this case to define the outer limits a prosecutor may go to obtain a conviction,

before a defendant's constitutional rights to a fair trial and to prepare a defense are violated.

II. THE TRIAL COURT'S IMPROPER CURTAILMENT OF PETITIONER'S CROSS-EXAMINATION OF THE CONFIDENTIAL INFORMANT VIOLATED PETITIONER'S CONSTITUTIONAL RIGHT OF CONFRONTATION

The right of confrontation is a fundamental constitutional right. *Delaware v. Van Arnsdale*, 475 U.S. 673 (1986). Enveloped in this right is the right of the accused to adequately cross-examine the witnesses against him. An unjustified limitation of the right to cross-examination may result in a new trial. *Dunbar v. Harris*, 612 F.2d 690 (2d Cir. 1979); *United States v. Alkins*, 925 F.2d 541 (2nd Cir. 1991); *Tinsley v. Kuhlman*, 973 F.2d 163 (2d Cir. 1992).

As the Statement of the Case indicates, the curtailment involved Petitioner's attempt to cross-examine the confidential informant regarding the tape transcript. Although Petitioner did not object to this curtailment and the less than even-handed treatment by the trial court, it has been held that no objection is necessary to preserve for appellate review a deprivation of a fundamental constitutional right. *Hawkins v. Lefevre*, 758 F.2d 866 (2d Cir. 1985). The failure to object was no doubt due to the Court's intimidation of defense counsel, as well as the fact that the Court improperly forced her to conduct an *ad hoc* cross-examination of a surprise government witness, to her distraction.

During cross-examination, after getting Espinal to admit that at one point, that Valerio's mother stated: "Forget about Wilfredo", which could have meant that Petitioner had nothing to do with the transaction, defense counsel then asked whether there were other references to Wilfredo, ostensibly to develop other exculpatory remarks. However, she was interrupted by the Court as follows:

"The Court: Doesn't the exhibit speak for itself?

Ms. Metzger: Yes, Your Honor.

The Court: You don't have to ask the witness that question. The jury has the exhibit. It's been admitted into evidence, and its speaks for itself."

The Court was wrong. The exhibit did not speak for itself. Otherwise, why did the Court allow Espinal during direct examination to provide incriminating explanations regarding Valerio's mother's and Diaz' references to "Wilfredo". Further, defense counsel had every right to "ask that question" to neutralize Espinal's inculpatory explanations.

A moment later, defense counsel returned to the transcript and began to question Espinal regarding the discussion concerning the car that this "Wilfredo" was going to come in. The import was that Petitioner owned a red car, but colors other than red were mentioned by the conversants, regarding the Wilfredo they were referring to.

Obviously, defense counsel was trying to show that Petitioner was not the "Wilfredo", the people were referring to. However, before Espinal could answer, the prosecutor, parroting the trial Court, objected as follows:

"Ms. Wilkinson: Objection, Your Honor, this is going right back to what you said. This exhibit speaks for itself."

"The Court: ...Now, the exhibit speaks for itself. The jury has it before them. We don't need to have this witness tell us what the exhibit says."

After this pointed admonishment, defense counsel abandoned any further questioning of Espinal with regard to the transcript.

The court should not have curtailed this inquiry. As indicated, he allowed the prosecutor to have Espinal tell the jury "what the exhibit says". With these explanations, the transcript became highly damaging to Petitioner as well as discrediting his defense witness Diaz, who was involved in the drug conspiracy. Therefore, the Court

should have permitted defense counsel the same leeway on Espinal's cross-examination.

Therefore, even though Petitioner failed to object, the improper limitation of defense counsel's cross-examination was so egregious and obvious, this Court must find a violation of Petitioner's constitutional rights. That is so because the transcript and Espinal's interpretation of the remarks, now became the strongest evidence of Petitioner's guilt. Not permitting Petitioner sufficient leeway to challenge this evidence was not harmless error and Petitioner is entitled to a new trial.

III. THE REQUESTED OMISSIONS IN THE COURT'S CHARGE VIOLATED PETITIONER'S DUE PROCESS RIGHT TO A FAIR TRIAL AND RIGHT NOT TO TESTIFY

In *Davis v. Alaska*, 415 U.S. 308, 316 (1974), this Court held that a prior conviction may be used to impeach a witness and should be considered by the jury in assessing a witness' credibility. See also *United States v. Noone*, 913 F.2d 20 (1st Cir. 1990). The forgoing is precisely what Appellant requested as a charge.

However, the trial court refused to so charge and pursuant to *Davis*, this was error. The error was not cured by the Court's barely adequate cooperating witness charge which omitted the prior reference. One legal principle concerning assessing credibility does not simply cancel out the charging of another legal principal, if the evidence warrants that both should be charged. The fact that Valerio was cooperating may have been one reason for the jury to discredit his testimony. However, Petitioner was entitled to have the jury consider Valerio's drug dealing conviction as another reason to discredit his testimony. Since the Government could not convict Appellant without Valerio's testimony, the failure to charge as requested, cannot be viewed as harmless error.

As indicated supra, the trial court failed to charge Petitioner's no adverse inference request, regarding his decision not to testify. In *United States v. Schabert*, 362 F.2d 369 (2d Cir. 1966), the Court held that if requested, a Court must instruct the jury that no adverse inference could be drawn from the Defendant's failure to testify. See also Sand, *Modern Federal Jury Instructions*, 5.07, Instruction 5-21 (1988); *United States v. Imram*, 964 F.2d 1313 (2d Cir. 1992). In the absence of such an instruction, the jury may well have drawn an adverse inference from Petitioner's failure to take the stand to rebut Valerio's and Espinal's testimony, as well as his failure to offer an explanation regarding the $5,000.00 that was recovered from his person incident to his arrest.

Notwithstanding Petitioner's failure to object, the failure to charge was still plan error, *United States v. Olano*, 113 S.Ct. 1770 (1993), for the reasons heretofore advanced. Accordingly, Petitioner is entitled to a new trial on the basis of the trial court's omission of instructions designed to insure that the accused receives a fair trial and that the proof beyond a reasonable standard is correctly utilized.

CONCLUSION

For these reasons, a writ of certiorari should be issued to review the opinion and Judgment of the Court of Appeals.

Respectfully submitted,

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APPENDICES

APPENDIX A

United States Court of Appeals

FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City and County of New York, on the 23rd day of Dec. one thousand nine hundred and ninety-three.

Present: HONORABLE WILLIAM H. TIMBERS,
HONORABLE GEORGE C. PRATT,
HONORABLE JOSEPH M. McLAUGHLIN
Circuit Judges.

UNITED STATES OF AMERICA,

Appellee,

- v. -

WILFREDO TAVAREZ,

Defendant-Appellant.

No. 93-1548

Appeal from the United States District Court for the Eastern District of New York (Feikens, J. at trial, sitting by designation; Glasser, J. at sentencing).

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York and was argued by counsel.

ON CONSIDERATION WHEREOF, it is hereby ordered, adjudged, and decreed that the judgment of the district court be and it hereby is AFFIRMED.

Wilfredo Tavarez appeals from a judgment of conviction entered December 7, 1992 after a jury found him guilty of conspiring to possess heroin with intent to distribute, in violation of 21 U.S.C. §841(a)(1), and possessing heroin with intent to distribute, in violation of 21 U.S.C. § 846. Tavarez was sentenced to 63 months' imprisonment, followed by four years' supervised release, and a $100 special assessment.

Tavarez argues that the district court erred by failing to instruct the jury to draw no inference from Tavarez's decision not to testify. Because Tavarez did not object at trial, we review the instruction only for plain error. *United States v. Olano*, 113 S.Ct. 1770 (1993). Doubtless, Tavarez was entitled to a negative inference instruction. Nevertheless, he did not suffer prejudice because the instruction given adequately safeguarded his rights: the jury was told that Tavarez had the right not to testify, and that the government bore the burden of proof on all matters. Thus, we find no plain error.

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Tavarez also argues that the sentencing judge mistakenly believed he lacked the power to depart downward from Tavarez's Guidelines sentencing range for "extraordinary family circumstances." *See United States v. Califano*, 978 F.2d 65 (2d Cir. 1992) (denial of downward departure reviewable only if judge wrongly believed he lacked power to depart). We disagree. Our reading of the full sentencing hearing transcript convinces us that the judge knew he could depart based on extraordinary family circumstances, but he concluded that Tavarez failed to show facts that warranted the departure.

Finally, Tavarez argues that the district court should have granted his motion for a new trial because the government introduced taped conversations into evidence that it had earlier said would not introduce because they were immaterial. Substantially for the reasons given in the district court's opinion of May 4, 1993, we affirm the denial of Tavarez's new trial motion.

We have reviewed Tavarez's other arguments and find them meritless.

Affirmed.

s/William H. Timbers
HON. WILLIAM H. TIMBERS,

s/George C. Pratt
HON. GEORGE C. PRATT

s/Joseph M. Mclaughlin
HON. JOSEPH M. McLAUGHLIN,
Circuit Judges.

N.B. THIS JUDGMENT WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND SHOULD NOT BE CITED OR OTHERWISE RELIED UPON IN UNRELATED CASES BEFORE THIS OR ANY OTHER COURT.

APPENDIX B

United States District Court

EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff,

v.

WILFREDO TAVAREZ,

Defendant.

No. 92-CR-1111 (ILG)
Hon. John Feikens
(sitting by designation)

OPINION AND ORDER DENYING MOTION FOR NEW TRIAL

On December 16, 1992, the jury convicted defendant, Wilfredo Tavarez, of conspiring to possess and distribute heroin (21 U.S.C. § 846) and of possession with intent to distribute heroin (21 U.S.C. § 841(a)(1)).

Defendant moves for a new trial.

His only contention is that government counsel misrepresented the contents of a Kel-tape recording of an August 26, 1992 meeting between Tomas Valerio, the government's principal witness; Rafael Espinal, a confidential informant (the "CI"); and Demingo Diaz (a/k/a Celo), the only defense witness.

The claimed misrepresentation is that government counsel informed defense counsel, when defense counsel so requested prior to trial, that the tape did not contain any reference to the defendant.

Prior to trial the government turned over the Kel-tape and eight other tapes, all in the Spanish language, to defense counsel.

At the onset of trial, defense counsel asked me to order the government to provide a transcript of the Kel-tape (Exhibit 10) to defendant. I declined to do so, since government counsel stated that no tapes would be used in the government's case. I also ruled that if this transcript "becomes important" we would discuss the request again (Tr. 32).

The government did not introduce the Kel-tape or a transcript of it in its case-in-chief.

When the government rested, defendant produced Domingo Diaz as its only witness. He was present at Valerio's apartment on August 26, 1992. His testimony sought to exculpate the defendant. Diaz claimed that he did not know who the supplier of drugs was and that Valerio had told him "some black men" were supposed to bring the heroin (Tr. 274). It is clear from the record that government counsel did not expect Diaz to testify because, by testifying, Diaz inculpated himself by admitting that he was involved in the drug deal.

After Diaz testified, and before the trial resumed, government counsel, Beth A. Wilkinson, outlined her conduct in an affidavit filed with the court and said:

> 13. On Monday, December 14, 1992, Agent Kernan and I reviewed the draft transcript for the August 26 kel tape to see whether there was anything in the tape inconsistent with Diaz's trial testimony. We located the portion of the transcript concerning Diaz. It was at that time that I first discovered two references to "Wilfredo" on page 68 of the transcript. I realized then that the participants in the conversation were discussing the arrival of Wilfredo Tavarez. Although there was no mention of heroin, I believed I could argue to the jury that the brief conversation concerning the arrival of "Wilfredo" showed that Tavarez was the

> expected supplier on August 26, 1992, thereby rebutting Diaz's testimony.
>
> 14. On December 14, 1992, I contacted Isolina Bernhardt, a Spanish interpreter, and asked her to review the tape and the draft transcript. I also contacted the CI and told him that I would now need his testimony on rebuttal. That same day, Ms. Bernhardt and the CI reviewed the tape and the final transcript. Ms. Bernhardt prepared a final transcript for the relevant portion of the tape which consists of only six pages of the original transcript.
>
> 15. The next day, December 15, 1992, I informed Ms. Metzger [defense counsel] that I was calling the CI as a rebuttal witness. When trial resumed, Ms. Metzger objected to the introduction of the tape and the transcript. She claimed that she had relied on the government's earlier statements that the tapes would not be introduced (Tr. 320). I explained that I had not planned to enter the tapes into evidence during the government's case-in-chief. I did not anticipate that Ms. Metzger would call a coconspirator who would claim that Tavarez was not the heroin supplier. (Tr. 320-21).

When trial resumed on December 15, 1992 to permit government rebuttal, an interpreter was called to translate the Kel-tape and transcript (Exhibits 9 and 10). Both exhibits were admitted into evidence without objection.[1] The government then called the CI, Rafael Espinal, and he testified that the government equipped him with a Kel-tape recorder and he then went to the meeting place. August 26 was the date Valerio informed the CI that he would have

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[1] While objection should have been made to preserve the point, it is factual that defense counsel had earlier objected to their admission before Espinal testified.

500 grams of heroin at his apartment. Diaz and the CI waited for Valerio, who eventually appeared without any heroin. As they waited the CI testified that he heard Diaz, Valerio and others discuss the expected arrival of "Wilfredo." On cross-examination of the CI, defense counsel elicited testimony that Valerio's mother asked what kind of a car that the "person named Wilfredo was to come in" (Tr. 395). The CI testified that the reference to Wilfredo was to "the person bringing drugs but I didn't know who Wilfredo was." (Tr. 375).

Because of this claimed misrepresentation defendant now contends he was denied a fair trial. This argument is without merit.

I find no misrepresentation. When government counsel made the statement that the tape contained no reference to defendant, she relied on a first draft of the transcript. After Diaz testified on the defense side of the case, with the CI's assistance, a replay of the tape to an interpreter revealed the reference to "Wilfredo."

This testimony and the exhibits constitute proper rebuttal.

I note, too, that the CI, Rafael Espinal, testified himself as to the references to "Wilfredo." The tape was only used to corroborate his testimony. Espinal's testimony was admissible even if the tape had not been introduced.

Defense counsel opened the door to this rebuttal. After introducing Diaz's testimony, defendant sought to block the government's use of the tape to corroborate the CI's testimony. Failing in this, the defendant now claims foul.

Apart from the testimony of Rafael Espinal, the tape (Exhibit 9) and the transcript (Exhibit 10) there was substantial evidence of defendant's guilt.

A final and most important point. The tape was in the hands of defense counsel well before trial. There was no withholding of its contents. Defense counsel, defendant and Diaz had ample opportunity to play the tape. Defendant had to expect that, if incriminating evidence were on the tape, it could be used against

him, particularly on rebuttal, in view of the testimony of Diaz. That "defendant's trial strategy was affected by the government's "late disclosure" is without merit. *See United States v. Sanchez*, 912 F.2d 18 (2d Cir. 1990) *See also United States v. Cirillo*, 499 F.2d 872 (2d Cir. 1974).

In *Cirillo* the introduction at trial of two conversations involving the defendant, which were intercepted by a phone wiretap, was objected to based on the government's failure to disclose their existence before trial. The defendant alleged that the prosecutor, after questioning by defense counsel, denied that defendant anticipated in any of the taped conversations. Nevertheless, the prosecutor in *Cirillo* provided defendant with copies of all the tapes, along with a log of their contents. The court concluded that transcripts of the conversations that were eventually admitted as evidence also should have been given to defendant before trial. However, the prosecutor's failure to do so was an innocent oversight. *Cirillo* at 882. Defendant argued that this failure required a shift in his trial strategy, after having used a different strategy in opening arguments. Nonetheless, the court refused to find reversible error.

United States v. Atisha, 804 F.2d 920, 925 (6th Cir. 1986), correctly summarized the law as follows:

> First, the mere fact that the defendant was surprised by the evidence does not mandate that the evidence be excluded. *See Herring*, 582 F.2d at 541, *United States v. Wixom*, 529 F.2d 217, 220 (8th Cir. 1976) (per curiam). Second there is no rule that evidence must be excluded or a mistrial granted on the basis that a defendant had committed himself to a theory which was undermined by new evidence. See *United States v. Bavers*, 787 F.2d 1022, 1028 (6th Cir. 1985). There is *always* a possibility that new evidence will be discovered, even if the defense was structured around assurances made by the government. This may be

> particularly so when the indictment charges a conspiracy (emphasis in original).

For these reasons defendant's motion for a new trial is DENIED.

IT IS SO ORDERED.

s/John Feikens
JOHN FEIKENS
UNITED STATES DISTRICT JUDGE

Dated: May 4, 1993